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Supreme Court of the United States

OCTOBER TERM, 1933.

No. 868

STATE OF OHIO, PUBLIC UTILITIES COMMISSION OF OHIO, THE WHEELING AND LAKE ERIE RAILWAY COMPANY, EASTERN OHIO COAL OPERATORS ASSOCIATION, ET AL., *Appellants*,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., *Appellees*.

No. 886

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, PUBLIC SERVICE COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA, THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., *Cross Appellants*,

v.

STATE OF OHIO, PUBLIC UTILITIES COMMISSION OF THE STATE OF OHIO, THE WHEELING AND LAKE ERIE RAILWAY COMPANY, ET AL., *Cross Appellees*.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION.

BRIEF ON BEHALF OF WESTERN PENNSYLVANIA COAL TRAFFIC BUREAU AND THE INDIVIDUAL MEMBERS THEREOF, CARNEGIE COAL CORPORATION, ET AL., APPELLEES IN NO. 868, AND CROSS APPELLANTS IN NO. 886.

WESTERN PENNSYLVANIA COAL TRAFFIC BUREAU, ET AL.

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April 30, 1934.

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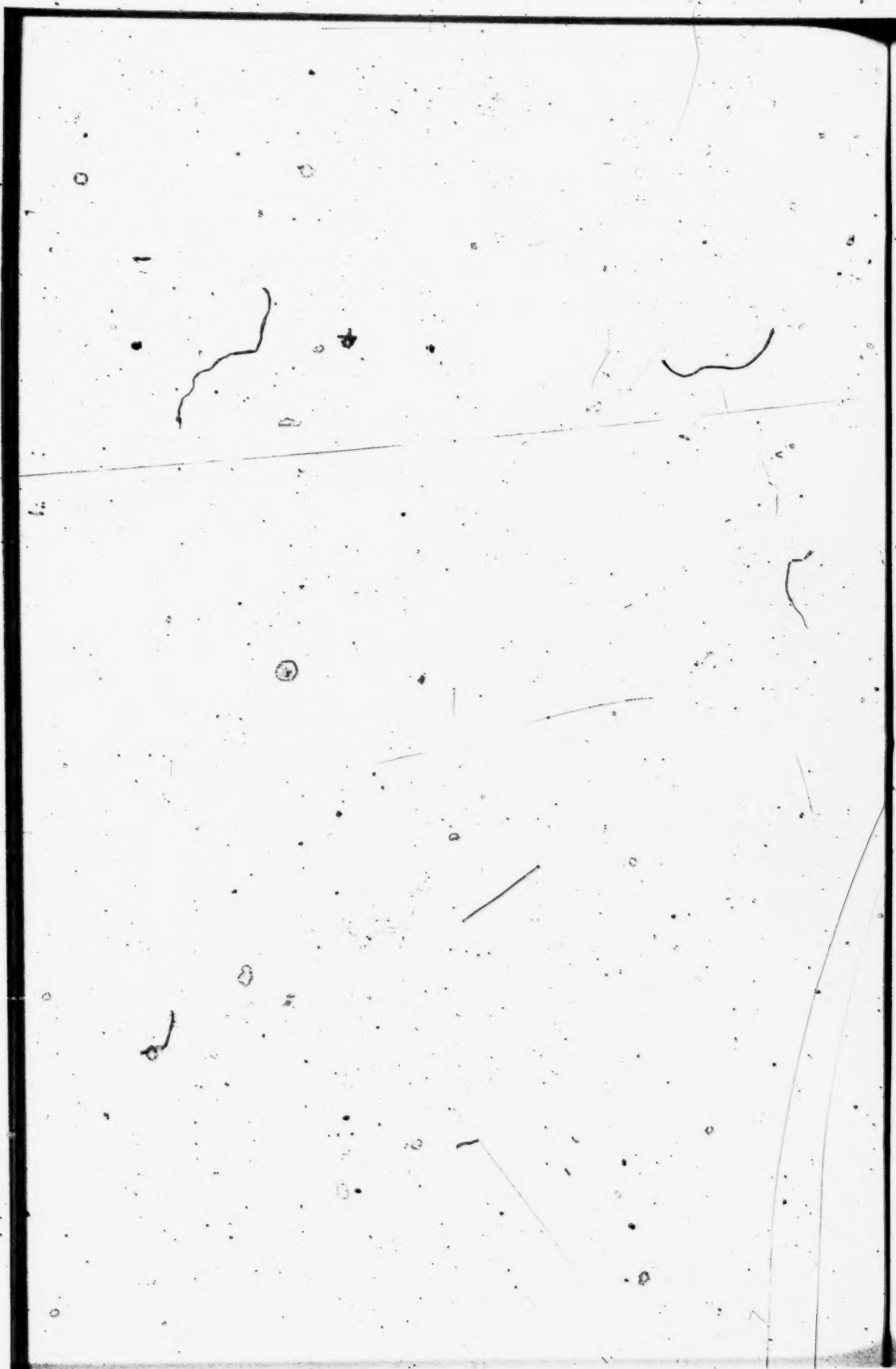

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The Issue.

The appellants, as Petitioners in the statutory court below, attacked as unlawful a certain order of the Interstate Commerce Commission (Tr. 77) and prayed for injunctive relief against the operation of the same and the rates required by that order to be made effective. (Tr. 1,

400) The three-judge court granted temporary relief from the operation of the Commission's order, but subsequently upheld it as lawful. (Tr. 466, 480, 481) The appeal from that decree is brought direct to this Court under the District Court Jurisdiction Act, 38 Stat. L. 219.

The sole question for determination by the Court is whether the order of the Commission is lawful.

The Proceedings Before the Commission.

The report of the Commission, and the order, the lawfulness of which is here in issue, were entered May 2, 1933, the citation being *Intrastate Rates on Bituminous Coal within Ohio*, 192 I. C. C. 413. (Tr. 17)

The title case in the proceedings before the Commission, Docket No. 25566, was an investigation on the Commission's own motion into the lawfulness of certain reduced intrastate rates on bituminous coal applying from mines in the State of Ohio to a considerable number, but not all of the destinations in the northeastern section of that state. (Tr. 1855) The most important of the destinations to which those reduced intrastate rates applied, is Cleveland.

The circumstances under which the order was entered were these:

The Public Utilities Commission of the State of Ohio, in formal complaint and answer proceedings before it, had ordered the common carrier railroads participating in the intrastate transportation of bituminous coal from the Middle Massillon and the Ohio, Number 8 producing districts to Canton and Massillon to reduce the rates applicable to such transportation, effective on August 1, 1932. Before that date one of those railroads, The Wheeling and Lake Erie Railway Company, sought the permission of the Ohio Commission also to reduce the intrastate rates on bituminous coal to other northeastern Ohio destinations, including Cleveland, the additional reductions to be made effective the same date, August 1, 1932. This permission was granted

by the Ohio Commission. The result, on the most important intrastate Ohio movement of bituminous coal, that from Ohio Number 8 district to Cleveland, was a reduction of 29 cents,—from $1.74 to $1.49 per net ton,—on August 1, 1932, and an increase in its differential advantage as compared with the base district, Pittsburgh, of almost 300 per cent,—from 10 to 39 cents per ton. (Tr. 1848-1855; and Tr. 556-559.)

Immediately thereafter, competing railroads, one after another, sought and obtained permission from the Ohio Commission to make similar rate reductions between the same districts and destinations via their intrastate routes, and this was also granted. Next, the Ohio Commission required the various railroads which had thus voluntarily reduced their rates from the Middle-Massillon and Ohio Number 8 districts, also to reduce their related rates from other Ohio producing districts so as to maintain theretofore established relationships between all such Ohio districts. Before November 1, 1932, had rolled around, reduced intrastate rates were in effect on practically the entire movement of bituminous coal from Ohio mines to the northeastern Ohio destinations affected, via all the intrastate routes. (Tr. 559-564, 566-567)

Furthermore, by virtue of the competitive action of the Pittsburgh & West Virginia Railway Company, which serves a few mines in the Pittsburgh district of western Pennsylvania as well as some in the Ohio Number 8 district, related reductions had been made from those few interstate mines. These reductions had first been suspended, but were subsequently permitted by the Interstate Commerce Commission to become effective on October 3, 1932, although their investigation was then continued by the Commission in two of these consolidated proceedings, Investigation and Suspension Docket Nos. 3801 and 3833. (Tr. 1278-1281, 1916, 1941, 1984.)

The main eastern trunk lines,—the Pennsylvania Railroad Company, the New York Central Railroad Company,

and the Baltimore & Ohio Railroad Company,—which were defendants before the Ohio Commission, opposed the original action of that Commission respecting the rates to Canton and Massillon, but unsuccessfully. Thereafter, the trunk lines, with the permission of the Ohio Commission, also extended intrastate reductions to other destinations, as had been done by the Wheeling & Lake Erie. After they had made such further intrastate Ohio reductions, these trunk lines on September 10, 1932, petitioned the Interstate Commerce Commission to enter upon an investigation of the Ohio intrastate rates to determine their lawfulness or unlawfulness under Sections 3 and 13 of the Interstate Commerce Act. (Tr. 558-559, 1848-1855.)

Pursuant to this petition of the trunk lines, the Commission on its own motion on October 31, 1932, entered into the investigation, Docket No. 25566, of the Ohio reduced rates. This order of investigation, however, was specifically limited to the intrastate Ohio rates on bituminous coal which had been *required* by the Public Utilities Commission of Ohio to be maintained, and to determine whether *such rates* cause or will cause any undue preference and prejudice as between persons and localities in intrastate and interstate commerce, or any unjust discrimination against interstate commerce. (Tr. 1855)

These limitations upon the scope of the Commission's investigation on its own motion were serious from the standpoint of the interstate persons and localities adversely affected by the various changes in the Ohio rates. In the first place, many of those rates,—including that from Ohio Number 8 to Cleveland, the most important,—had never been *required* to be maintained by the Ohio Commission. In the second place, no interstate rates were directly embraced within the scope of the Commission's investigation, and important interstate carriers were not named as respondents therein.

Accordingly, Western Pennsylvania Coal Traffic Bureau and its individual members, Carnegie Coal Corporation,

et al., operators of bituminous coal mines in the Freeport, Pittsburgh, and Connellsville districts of western Pennsylvania and large shippers to northeastern Ohio, filed their own complaint with the Interstate Commerce Commission. Their allegations were that the interstate rates from said three western Pennsylvania districts to destinations in northeastern Ohio,—described as that portion of the State east of the Sandusky-Galion line and north of an east and west line through Columbus—were unreasonably high, and that the relation between those interstate rates and the intrastate rates from eastern Ohio mines to the same destinations resulted in undue prejudice and preference in violation of Sections 3 and 13 of the Interstate Commerce Act. There was no allegation by the Western Pennsylvania complainants that the Ohio intrastate rates in any way cast a revenue burden upon interstate commerce. (Tr. 1987.)

The trunk line carriers, in answering the Western Pennsylvania complaint, admitted the undue preference and advantage to the competitors of western Pennsylvania, but averred further that such undue preference and advantage was caused solely by unduly low rates applicable intrastate within Ohio as a result of orders either mandatory or permissive of the Public Utilities Commission of Ohio which are now under investigation by this Commission in Docket No. 25566. (Tr. 2000-2001, 2004, 2007.)

This Western Pennsylvania complaint, docketed as No. 25590, was one of the cases consolidated by the Commission with its Thirteenth Section investigation, No. 25566, for joint hearing and determination. There were also embraced in the consolidated proceedings the two investigations into the P. & W. V. Ry. rates, already named, and various complaints brought by operators in northern and southern West Virginia and eastern Kentucky producing districts. Before hearing was finally commenced, the Commission's order of investigation on its own motion was amended so as to embrace therein the Ohio intrastate rates

"required, authorized, or permitted to be maintained" by the Ohio Commission. (Tr. 17-18 footnote, 19, 1872.)

It was as the final result of the consolidated proceedings of investigation by the Interstate Commerce Commission into these various matters, that the Commission on May 2, 1933, entered its order against which these appellants complained below, in connection with its report same date, cited as *Intrastate Rates on Bituminous Coal within Ohio, supra*. By that order the Interstate Commerce Commission required that the intrastate rates on bituminous coal in Ohio, which had, as hereinbefore recited, been required, authorized, or permitted to be maintained at reduced levels by the Public Utilities Commission of Ohio, should be raised to their previously effective levels,—that is to say, to the level of just prior to August 1, 1932. This, in the case of Cleveland, the most important destination, meant that the rate of $1.45 from Ohio Number 8, the most important producing district, should be raised from that figure to $1.74 per net ton. Contemporaneously, the Commission took action to restore the P. & W. V. Ry. interstate rates to their former higher level. (Tr. 17, 77-79.)

It is the lawfulness of this order of the Interstate Commerce Commission dated May 2, 1933, requiring the Ohio intrastate rates to be raised, that is here in issue.

The Proceedings Before the District Court.

Petitions attacking the Interstate Commerce Commission's order of May 2, 1933, were filed in the District Court for the Southern District of Ohio, Eastern Division, by the State of Ohio, the Public Utilities Commission of Ohio, and the Wheeling and Lake Erie Railway Company, and the Ohio bituminous coal mine operators, and some others, appeared in the court as intervening plaintiffs. (Tr. 1, 400; 354, 355, 359, 429, 430, 434.) The petitions were consolidated and a joint hearing had before three judges as required by the statute. (Tr. 482.) On June 3, 1933, the

Court handed down its order temporarily restraining the order of the Interstate Commerce Commission, and by virtue thereof the increased Ohio intrastate rates which were then on file with the Interstate Commerce Commission and scheduled to become effective on July 10, 1933, were temporarily held in abeyance, and the reduced Ohio intrastate rates continued in effect. (Tr. 399.)

On January 6, 1934, the District Court handed down its decision, ... Fed. (2d) ...., not yet reported (Tr. 466-472), sustaining the Commission's order of May 2, 1933 as lawful, and announcing that decree to dismiss the bills might be prepared and filed January 13, 1934. Prior to that date the appellants, as plaintiffs below, filed applications asking a temporary stay of the effectiveness of the Commission's order pending appeal to this Court. (Tr. 501.) This application was heard January 19, 1934, the temporary decree against the operation of the Commission's order being effective meanwhile. On the latter date decrees adjudging the order to be lawful, and dismissing the bills of complaint, were entered by the District Court, but simultaneously that Court stayed the effect of the Commission's order of May 2, 1933, for sixty days, pending appeal to this Court. (Tr. 466, 473, 480, 481, 531)

Prior Proceedings in this Court.

On February 7, 1934, the defendants and all of the intervening defendants in the Court below—being United States of America, Interstate Commerce Commission, Public Service Commission of the Commonwealth of Pennsylvania, the trunk line railroads, and the interstate bituminous coal mine operators of western Pennsylvania and northern West Virginia,—filed with this Court their Motion to abate so much of the order of the District Court entered in these proceedings on January 19, 1934, as stayed the operation and enforcement of the order of the Interstate Commerce Commission of May 2, 1933, for sixty days

pending appeal. On February 12, 1934, this Court handed down its decree setting aside that stay.

Thereupon the various Ohio intrastate rates on bituminous coal which in the period August 1, 1932-November 1, 1932, had been reduced by authority, requirement or permission of the Ohio Commission were promptly restored by all the common carrier railroads to their previously effective higher levels. Those rates so increased to such levels continue in effect today.

Summary of Argument.

The sole question here is the lawfulness of an order of the Interstate Commerce Commission which required that railroads transporting bituminous coal in intrastate commerce from Ohio mines to certain northeastern Ohio destinations should increase the intrastate rates applicable to such transportation. The order was issued as one necessary to remove undue prejudice to persons and localities in interstate commerce and unjust discrimination against interstate commerce, found by the Commission to exist in such intrastate rates.

The controversy before the Commission was essentially one of rate relationship. The Ohio intrastate rates in a period of a few months, commencing August 1, 1932, had been reduced by authority, requirement, or permission of the Public Utilities Commission of Ohio. Interstate rates applicable to the transportation of competing coal were not reduced. The consequence was a disruption of long-existing rate relationships between intrastate Ohio and interstate commerce in bituminous coal to northeastern Ohio destinations.

The Commission, as the result of an extensive investigation, concluded that undue prejudice to persons and localities in interstate commerce, and unjust discrimination against interstate commerce were present, and that the interstate rates were reasonable. Having so found, it

ordered that the undue prejudice to interstate commerce, and the unjust discrimination against interstate commerce, should be removed by raising the Ohio intrastate rates to their previously effective higher level,—in other words, by restoring the previously long-existing rate relationships.

There was substantial evidence before the Interstate Commerce Commission to warrant its finding that the reduced Ohio intrastate rates resulted in undue prejudice to persons and localities in interstate commerce. The report of the Commission supported its final conclusions with respect to the lawfulness of the rates and the rate relationships by adequate findings of fact, based upon that substantial evidence. Under such circumstances, the District Court upheld the order in accordance with long-established doctrine laid down by the decisions of this court, and its decree should be affirmed and the appeals dismissed.

The appellants charge that they were denied the full hearing contemplated by the statute because the Commission entered upon this proceeding of investigation resolved in the beginning that it would restore the Ohio rates to the formerly effective higher levels. There is nothing in the record before the Commission to justify this charge.

Section A.

Argument.

These appellees were complainants before the Commission, and there alleged that the interstate rates from western Pennsylvania mines to northeastern Ohio destinations were unreasonably high, and that the relation between such rates and the reduced Ohio intrastate rates resulted in undue prejudice to persons and localities in interstate commerce. They made no allegation that the reduced Ohio intrastate rates cast a revenue burden upon interstate commerce. (Tr. 1987.)

The Commission found the interstate rates to be reasonable; but further, that the reduced Ohio intrastate rates

were unduly prejudicial to interstate localities and shippers, including those of western Pennsylvania, and also unjustly discriminatory against interstate commerce from a revenue viewpoint. (Tr. 63-65.)

The District Court upheld the order on the finding of undue prejudice to interstate persons and localities alone. (Tr. 468-470.)

Because such undue prejudice was the basic reason for the Western Pennsylvania complaint; because western Pennsylvania never contended that the reduced Ohio rates burdened interstate commerce in a revenue sense; and because the Commission's order is fully justified and lawful on the persons and localities issue alone, we shall confine this argument to supporting the action of the Commission as sustained by the District Court.

I. THE CONTROVERSY BEFORE THE COMMISSION WAS ESSENTIALLY ONE OF RATE RELATIONSHIP.

Northeastern Ohio, described as that section of the state lying east of the Sandusky-Galion line and north of an east and west line through Columbus, is a highly industrialized area containing many industries producing similar character of output and intensely competitive with each other. This is particularly so with respect to iron and steel industries and by-product coke ovens. The important steel producing areas are Cleveland, Lorain, Canton, Massillon, Mansfield, and Youngstown, and all of these except Mansfield manufacture by-product coke. The adjacent and nearby territory of northwestern Pennsylvania and western New York is similarly industrialized and contains additional iron and steel producing districts and many by-product coke oven operations. All of these industries throughout northeastern Ohio, northwestern Pennsylvania and western New York, are highly competitive with each other. (Tr. 576-577, 769.)

Naturally, in this intensified manufacturing area there is a large consumption of bituminous coal. The great bulk of this coal is produced at mines in eastern Ohio, western Pennsylvania, and northern West Virginia. The Ohio bituminous coal production is solely steam and domestic coal; the western Pennsylvania and northern West Virginia production, however, embraces also gas and metallurgical coal. The gas and metallurgical coal is adapted for steam and domestic consumption and is so used, as well as for gas production and metallurgical purposes. Thus, all the western Pennsylvania and northern West Virginia coal is competitive with the Ohio production, and this is so particularly in the markets of northeastern Ohio, and also in northwestern Pennsylvania and western New York. (Tr. 767-768, 771-774, 843-844.)

Of all the coal shipped by western Pennsylvania mines in 1930 to C. F. A. territory,—the territory north of the Ohio River and between the Mississippi River on the west and the Buffalo-Pittsburgh line on the east,—62.2 per cent went to Ohio and practically all of it to northeastern Ohio. In the same year the Ohio mines shipped to Ohio destinations 59.6 per cent of their total shipments to C. F. A. territory, and much the larger part of that went to northeastern Ohio. (Tr. 769-771.)

The transportation of the bituminous coal production of eastern Ohio, western Pennsylvania and northern West Virginia to northeastern Ohio, and also to northwestern Pennsylvania and western New York, is mainly by the lines of the Pennsylvania Railroad Company, the New York Central Railroad Company, the Baltimore & Ohio Railroad Company, the Wheeling & Lake Erie Railway Company and the Nickel Plate-Erie System. This transportation is performed on rates which are related to each other from the standpoint of origin districts, and are related to each other also from the standpoint of destinations. (Tr. 658-659, 661, 662-663, 668-669, 674, 1044; Ex. Tr. II, 247).

This rate relationship as between the coal producing districts and as between the coal consuming destinations, is a relationship which has been long maintained,—or had been prior to August 1, 1932, when the Ohio reductions commenced,—based upon the rate from the Pittsburgh district to Youngstown as the "key" rate. With the rate from Pittsburgh to Youngstown fixed, rates from more removed coal producing districts, such as Connellsville and Fairmont are made by plussing the rate from Pittsburgh; the Number 8 district in eastern Ohio, though also farther removed from Youngstown than is Pittsburgh, is accorded the Pittsburgh rate; the Cambridge district of eastern Ohio, farther still from Youngstown than is Pittsburgh, is also accorded the Pittsburgh rate. Again, with the rate fixed from Pittsburgh to Youngstown, the Pittsburgh rate to Cleveland is made by plussing the rate to Youngstown by 50 cents per ton, and the rates to Canton and Massillon are made by splitting that differential, that is, by plussing the Youngstown rate by 25 cents per ton. Number 8, having a slight advantage in distance to Cleveland, takes a rate 10 cents per ton less, and Cambrige is accorded the same rate for its longer haul. (Tr. 575-576, 582-585.)

Such, in general, was the relationship of bituminous coal rates principally here involved, for many years prior to the inception of this controversy in the summer of 1932. It was the disruption of those relationships by the Ohio reductions which precipitated this controversy before the Interstate Commerce Commission.

II. THE REDUCED INTRASTATE RATES ON BITUMINOUS COAL WHICH WERE REQUIRED, AUTHORIZED OR PERMITTED TO BE MAINTAINED BY THE PUBLIC UTILITIES COMMISSION OF OHIO FROM OHIO MINES TO NORTHEASTERN OHIO DESTINATIONS DISRUPTED THE PREVIOUSLY LONG MAINTAINED RELATIONSHIP OF RATES AS BETWEEN COAL PRODUCING DISTRICTS AND COAL CONSUMING DESTINATIONS.

It is first to be observed that of all the reductions in the intrastate Ohio rates, comparatively few were *required* to be maintained by the Ohio Commission. Practically speaking, all the reductions grew out of the action of that Commission in requiring a reduction in the rates from the Middle-Massillon and the Ohio Number 8 districts to Canton and to Massillon. (Tr. 556, 557-567.)

It is important that this be kept in mind, the fact being that all these reduced Ohio rates are by no means in the category of Commission-made rates.

After the reductions had been ordered from Middle-Massillon and Ohio Number 8 to Canton and Massillon, one carrier respondent,—the Wheeling & Lake Erie,—sought permission from the Ohio Commission voluntarily to extend reductions to other destinations in order to preserve destination competition. Thus came the reductions to such important coal consuming points as Cleveland and Lorain This action of the Wheeling & Lake Erie prompted like action by the competing carriers, who also served such producing districts and such destinations. (Tr. 557-559, 916-917, 931.)

The next step was action by the Ohio Commission to require the carriers which had thus voluntarily,—so to speak,—reduced rates from the Number 8 district to reduce rates also from the Cambridge district on the ground that Cambridge usually took the same rate as did Number 8,

although farther removed from this northeastern Ohio market. This was to maintain origin relationships in Ohio. The reductions having thus spread from Middle-Massillon and Number 8 to a farther removed district on the south—Cambridge—the next step was to require the carriers to make similar or related reductions from districts farther west and southwest in Ohio, such as Hocking, Crooksville, and Pomeroy. Thus again, Ohio aimed to preserve Ohio origin relationslips. (Tr. 562-567)

The point to be observed is that once the rates from Middle-Massillon and from Number 8 to Canton and Massillon were pegged, about everything else that was done in Ohio was hung on that peg. In other words, the Wheeling & Lake Erie Railway, essentially an Ohio intrastate line, and the Public Utilities Commission of Ohio by successive action accomplished the reduction of the rates from the Middle-Massillon, Number 8, Cambridge, Crooksville, Hocking and Pomeroy districts in eastern and southern Ohio to northeastern Ohio destinations,—not because the rates in every instance were reasonable *per se*, but for the most part to maintain within Ohio the relationship of rates from both origin and destination standpoints.

But it must also be observed that not all of northeastern Ohio benefited. None of the territory east of a line drawn through Cleveland and Akron, a territory which includes such important iron and steel manufacturing districts as Youngstown and the Mahoning Valley, and includes also such territory as Painesville and Ashtabula, was accorded any reductions whatsoever. (Tr. 834-835.)

To summarize, by the action of the Ohio Commission, the rate regulating body of the State of Ohio, and by the action of the Wheeling and Lake Erie Railway, essentially an Ohio line, all three of which are appellants here, and were plaintiffs in the Court below, there was a series of reductions in the intrastate Ohio rates on bituminous coal from practically all producing districts in that state to a con-

siderable number, but not all, northeastern Ohio destinations.

All that the State of Ohio, the Ohio Public Utilities Commission, and the Wheeling & Lake Erie could do to maintain both origin and destination relationships *within Ohio*, they did. Inevitably, the intrastate Ohio rate reductions disrupted the relationships with interstate competitors, both producers and consignees. In the case of Cleveland, the most important destination, the result was to increase the Ohio Number 8 district's differential advantage, as compared with the Pittsburgh district, *from 10 cents to 39 cents per ton.* (Tr. 788-789; Ex. Tr. II, 262.)

III. THE ORDER OF THE INTERSTATE COMMERCE COMMISSION MERELY RESTORED THE PREVIOUSLY LONG MAINTAINED RELATIONSHIP OF RATES.

In the consolidated proceedings before the Commission there were embraced not only the Commission's investigation on its own motion into the reduced Ohio intrastate rates, but also the complaints attacking the interstate rates from western Pennsylvania and other interstate mines to northeastern Ohio destinations, and the I. & S. proceedings wherein the Commission was investigating certain competitive reductions which had been established from a few mines on the P. & W. V. Ry. in the Pittsburgh district of Pennsylvania. (Tr. 17 footnote.)

The Commission found the rates from western Pennsylvania mines to be not unreasonable or otherwise unlawful, and ordered the complaint dismissed. With respect to the reductions in the rates from the P. & W. V. Ry. mines in the Pittsburgh district the Commission found them unjustified and took action calculated to restore them to the previously effective higher level. (Tr. 63-65) With respect to the intrastate rates within Ohio the Commission found and ordered, for the purpose of removing the undue

prejudice to persons and localities in interstate commerce and the unjust discrimination against interstate commerce, that the previously effective rates should be re-established; that is, that there should be re-established

> "Rates not less than those applicable from and to the points or groups named, and in effect immediately prior to August 1, 1932." (Tr. 64, 76-77)

Thus it will be observed that the Commission merely ordered restored the entire *status quo ante* with respect to the rates on bituminous coal from Ohio mines and from the few P. & W. V. Ry. western Pennsylvania mines to destinations in northeastern Ohio.

IV. THERE WAS SUBSTANTIAL EVIDENCE BEFORE THE INTERSTATE COMMERCE COMMISSION TO WARRANT THE FINDING THAT THE REDUCED OHIO INTRASTATE RATES RESULTED IN UNDUE PREJUDICE TO PERSONS AND LOCALITIES IN INTERSTATE COMMERCE.

The evidence with respect to the lawfulness of the rates and the rate relationships which were involved in the various proceedings embraced the following:

The history of the rates and of the rate relationships are set forth in detail in Kern Exhibits 23 et seq. before the Commission (Ex. Tr. I., 144-158) which is a series from which it appears that generally speaking, the only changes in the rates on bituminous coal to northeastern Ohio destinations up to August 1, 1932, the date when the first Ohio intrastate reductions became effective, have been those of a general character made during and since the war, and applicable to the entire rate structure. The Ohio intrastate reductions and the competitive reductions from P. & W. V. Ry. mines were the first break from this established order.

The result to the principal destinations affected was set forth by witness Boden in his Exhibit 105 (Ex. Tr. II., 262-264).

This rate history shows that the Ohio rates do not constitute a thing of itself, but that they are part and parcel of the adjustment of rates from Ohio, western Pennsylvania, and northern West Virginia mines to northeastern Ohio, northwestern Pennsylvania and western New York. The relationships may be followed, geographically, on the frontispiece map in the Ohio appellants' joint brief. Pittsburgh is the "base" rate district and the other producing districts in western Pennsylvania, in eastern Ohio, and in northern West Virginia are rated differentially on, over, or under the Pittsburgh base. To Cleveland, for instance, the Number 8 district of eastern Ohio normally takes a rate 10 cents under the Pittsburgh district, having somewhat of a distance advantage. The Cambridge district of eastern Ohio, although enjoying no such distance advantage, is, as is usual, accorded the same rate as the Number 8 district. To Youngstown, with respect to which the Number 8 district is under a distance handicap (Ex. Tr. II., 260-261) it nevertheless enjoys the same rate as is paid by the Pittsburgh district and the more removed Cambridge district again takes the Number 8 district rate. This relationship obtains throughout northwestern Pennsylvania and western New York, to all of which territory the Number 8 district has a distance handicap as compared with Pittsburgh, but pays nothing higher than the Pittsburgh rate, with the Cambridge district, always under a greater distance handicap paying only the same rate as Number 8 (Ex. Tr. II., 260-261).

On the subject of distances from the various mines to the different destinations, there were literally days of testimony and reams of transcript thereof before the Commission. As summarized in Appendix A to the Commission's report (Tr. 70-73), it will be observed that to Cleveland the average short tariff route distance from Ohio Number

8 "active" mines is 128.2 miles; from Cambridge 176.1 miles; and from Pittsburgh 162.0 miles. But these Appendix A results were not all the distance comparisons by any means. It was shown that by the average distances from all mines via all tariff routes, Number 8 to Cleveland was 157 miles; Cambridge 202 miles; and Pittsburgh 172 miles (Ex. Tr. I., 254, II., 265). From all mines via the short tariff routes the average distance from Number 8 to Cleveland is 135 miles; from Cambridge 195 miles; and from Pittsburgh 166 miles. (Ex. Tr. IV., 219-220.) Via the shortest tariff routes the average distances from all mines to Cleveland was, from Number 8, 116 miles; from Cambridge, 161 miles; and from Pittsburgh, 138 miles. (Ex. Tr. I., 160-161; IV., 219.) From the nearest mine group with a consequential tonnage production the distance via the shortest tariff routes from Ohio Number 8 to Cleveland was 136 miles; from Cambridge, 161 miles, and from Pittsburgh 138 miles. (Ex. Tr. I., 160, IV., 219-220). Thus it is to be observed that the Commission had before it distances from these different mines and mining groups to these destinations, computed by almost every conceivable method from "active" mines and from all mines.

The evidence of transportation conditions over the various routes via which the rates in controversy apply embraced a wide scope. There was a description of the location of the lines with reference to whether they were water-level or cross-country routes, and whether they were single or multiple track routes, and this included testimony of grade conditions. All of this was to the general effect that the conditions of transportation on the interstate routes from western Pennsylvania to northeastern Ohio was as good as or better than on the intrastate Ohio routes. (Tr. 778, 711-712, 717, 727.)

The evidence of operating officers of the various carriers was that transportation conditions over their different lines in western Pennsylvania, western New York, northern West Virginia and eastern Ohio are generally similar, and that

there is no good reason from the standpoint of transportation conditions for any difference in rates on bituminous coal. This testimony, however, was without reference to the balance of the movement which results from the return loading of iron ore from the Lake Erie ports to western Pennsylvania and eastern Ohio blast furnaces, in connection with the movement of coal in the opposite direction from the mines to northeastern Ohio. (Tr. 701-708; 713-725; 725-730; 1285.)

There was further evidence on the subject of transportation conditions in the form of studies of locomotive tractive effort expenditure in the transportation of bituminous coal and of the number of gross ton miles of transportation service produced per thousand tractive power pound hours of locomotive service. These studies indicated that the transportation conditions from the western Pennsylvania districts are considerably more favorable than are those from eastern Ohio. (Tr. 779-782; Ex. Tr. II., 253-256.)

Studies were made on behalf of the Ohio operators and the Wheeling & Lake Erie Railroad of the average pounds of locomotive tractive power required to haul one gross ton of car and contents of bituminous coal over the various railroad lines involved. These indicated that from Number 8 and Cambridge districts in eastern Ohio, the tractive effort expenditure was 15.92 pounds; from Pittsburgh in western Pennsylvania, it was 16.05 pounds; from Connellsville in western Pennsylvania, it was 15.90 pounds; and from Fairmont in northern West Virginia it was 16.96 pounds. (Ex. Tr. III., 305, IV., 38, 39, 40, 43.)

There were certain infirmities in these exhibits but taking the results as they were submitted on behalf of the Ohio operators and the Wheeling & Lake Erie (Tr. 1376-1384) they bear out the testimony of the carriers' operating witnesses that the conditions of transportation on these lines are generally similar and so much so that there is no good reason from the standpoint of transportation conditions for any difference in the rates on bituminous coal.

There was a considerable volume of testimony to show the density of traffic on these different lines of railroad. From the experience of the Pittsburgh & Lake Erie and the Bessemer & Lake Erie, which are essentially western Pennsylvania lines, and of the Wheeling & Lake Erie, essentially a northeastern Ohio line, it appears that the density in western Pennsylvania is about three times that of northeastern Ohio. It appears further that the movement of bituminous coal traffic from western Pennsylvania to northeastern Ohio is over routes of movement where the density is generally exceptionally heavy. (Tr. 776-778, Ex. Tr. II., 252.)

There was evidence showing the trend of the movement of bituminous coal for a period of some ten years back and this was supplemented by month to month figures during the period when the reduced Ohio rates were in effect. This evidence showed a considerable reduction in the bituminous coal movement during the depression years following 1929 and showed also, following the Ohio reductions, a very heavy increase in the Ohio movement, with no similar increase, but a decrease, relatively, in the interstate movement. (Tr. 610-618, 638, 645, 731, Ex. Tr. II., 112-141; IV., 175-195, 252-260; Tr. 769-771, 798, 806, 814-815, 1420-1422, Ex. Tr. II., 248-251, IV., 197-198; Tr. 841-851; Tr. 1213-1214, 1219-1220, 1224-1225.)

The record is replete with comparisons of the rates in issue with other rates on bituminous coal. Principally the proponents of the Ohio rates and the complainants attacking the interstate rates, relied upon the so-called Illinois-Indiana scale of bituminous coal rates fixed by the Interstate Commerce Commission. The carriers, on the other hand, relied for the most part upon comparisons of rates in western Pennsylvania and western New York, and rates eastbound from western Pennsylvania. (Tr. 621-626, 628-629, 648; Tr. 782-798, 828; Ex. Tr. III., 266-289; Tr. 1259; Tr. 1152, 1283-1291; 1039-1041; Adell Tr. 1060 *et seq;* Ackerman Tr. 1156 *et seq.*)

There was extensive testimony by the carriers (Tr. 559, 664, 675) and by the interstate shippers of the damage suffered by them on account of business lost to Ohio because of the reduced Ohio rates. This, on behalf of these intervening western Pennsylvania operators may be briefly summarized as follows:

The increase of their differential handicap in competing with eastern Ohio coal in northeastern Ohio markets was of the utmost seriousness to the western Pennsylvania operators. Even before the Ohio rates were actually reduced, the adverse effect upon the sales of western Pennsylvania coal were apparent; the customers knew that rate questions were up for determination, and some thought they had some foreknowledge of what was coming and declined to tie up their coal business with western Pennsylvania. As soon as the Ohio rates were reduced, there was an immediate tendency of the trade to leave the high-rated Pennsylvania territory for the reduced-rate producing territory in Ohio. When in early October the rates were reduced from P. & W. V. Pittsburgh district mines there was a shift also to the latter. (Tr. 830-835, 836.)

The Cleveland office of the Pittsburgh Coal Company in its sales to the steam and domestic trade only, summarized its experience as a result of the Ohio and the Pittsburgh & West Virginia reduced rates, in testimony given December 19, 1932, as follows:

Of customers who for years had purchased coal on contract from this company and were actually under contract during the present coal year, April 1, 1932-April 1, 1933, there were ten customers whose business aggregated 14,300 tons a year, who immediately discontinued purchases. (Tr. 831.)

Of customers who in previous years had bought coal on contract but who declined this year to make new contracts because of the agitation on freight rates and the likelihood of Ohio reductions, and who therefore made their purchases up to August 1 on a spot basis, 15 have left the Company

and the tonnage thus lost for the year equals 646,900 tons. (Tr. 831-832.)

Of regular buyers year by year, who did not customarily buy on contract, but who were actually buying coal up to August 1, 1932, there were 60 who quit purchasing immediately thereafter, the loss to the company for the year being 149,700 tons. (Tr. 832-833.)

There is another group of the trade consisting of customers who from time to time have bought the company's coal in the past, and some who have made trial purchases and utilized the company's engineering and combustion services,—trade which might formerly have been considered potential,—in which 39 customers with business aggregating 123,800 tons per year, are counted as lost. (Tr. 833.)

Included in this lost trade are consumers who are described as public utilities, large and small manufacturers, operators of greenhouses (of which there are a great many in this territory) and retail dealers. Of the latter it is said that in the fall of 1931 the Pittsburgh Coal Company was running half-page advertisements in the Cleveland papers advertising its "Champion" domestic coal, which is a coal specially mined, washed and prepared in the most modern manner, and naming 25 retailers who were handling that coal in the Cleveland market. After August 1, 1932, not a single one of those retailers was handling that coal because of the reduction in rates on the competing coals. (Tr. 833-834, 837-838.)

In years past this one company's steam and domestic business in this particular market territory has aggregated as much as 1,750,000 tons. The business lost to Ohio and P. & W. V. mines on account of these reduced rates, as already detailed, amounts to almost one million tons, and is equal to about two-thirds of the company's current business in the year when the rates were reduced. (Tr. 836-837, 848-850.)

Not all of this northeastern Ohio territory has enjoyed the benefit of reductions in rates from the eastern Ohio and the P. & W. V. mines. It has been the experience of the western Pennsylvania operators that they have not lost to Ohio and P. & W. V. producers the business of other northeastern Ohio trade to which no rate reductions have been accorded. In fact, in some instances the same customers who have declined to purchase Pittsburgh coal at destinations to which the Ohio rates have been reduced, have continued to purchase Pittsburgh district coal at other northeastern Ohio markets to which the rates have not been reduced. (Tr. 832, 834-835.)

V. THE COMMISSION, OUT OF THE SUBSTANTIAL EVIDENCE BEFORE IT IN THESE PROCEEDINGS, MADE FINDINGS ADEQUATE TO SUPPORT ITS ULTIMATE CONCLUSION THAT THE REDUCED OHIO INTRASTATE RATES UNDULY PREJUDICED PERSONS AND LOCALITIES IN INTERSTATE COMMERCE.

The ultimate conclusion of the Commission was that the reduced Ohio intrastate rates "are and for the future will be unduly preferential of Ohio shippers and localities and unduly prejudicial against interstate localities and shippers of bituminous coal from the rate districts, as hereinbefore defined in Pennsylvania and West Virginia to the same destinations in Ohio;" also, that the reduced Ohio intrastate rates "result and will result in undue, unreasonable, and unjust discrimination against interstate commerce." (Tr. 64.) These are the formal findings in the language of the statute.

The finding of undue prejudice to persons and localities in interstate commerce is supported by the further finding that the Ohio intrastate and the interstate coals are highly competitive at the northeastern Ohio destinations to which the reduced rates applied; that there is a substantial move-

ment of coal from those origins to such destinations; that that movement from the Ohio mines is on intrastate rates "which are generally substantially lower, distance considered, than are the reasonable interstate rates," which the Commission approves in its report, and under which the interstate coal moves from Pennsylvania and West Virginia mines to the same northeastern Ohio destinations; that this disparity in rates is greater than is warranted by the differences in transportation conditions from the Ohio mines on the one hand and from the Pennsylvania and West Virginia mines on the other (Tr. 63.)

But underlying all this which the Commission found and labeled as "Findings," there was a preceding lengthy recital of the facts of record, in connection with which the Commission made supporting findings on the following subjects:

> The history of the Ohio intrastate rate reductions and the measure of those reductions. (Tr. 20-22.)
>
> Average distances over the short tariff routes (Tr. 22).
>
> The history of the reductions from the P. & W. V. Ry. mines in western Pennsylvania and the measure of such reductions. (Tr. 22-23.)
>
> The filing of complaints by interstate shippers "in consequence of" the Ohio reductions. (Tr. 23.)
>
> The rate relationships between the competing originating districts and the development of the general rate adjustment in this territory. (Tr. 23.)
>
> The restricted application of the routes via which the Ohio intrastate reductions apply so as to avoid changes in rates to intermediate points. (Tr. 23.)
>
> A description of the destination area, its intensive industrialization, the character of the industries located therein, the carriers which serve the producing districts and the movement of coal over their lines, the volume of that movement, and the kind and quality of the coals. (Tr. 24-25.)
>
> The kind and quality of the coals produced in western Pennsylvania, northern West Virginia and Ohio mines, and the division of the production in western Pennsylvania between gas and metallurgical coal on the one hand, and steam and domestic on the other hand. (Tr. 25-26.)

The volume of the movement of the purely steam and domestic coal from the western Pennsylvania mines to northeastern Ohio in competition with coal of the same kind and quality from Ohio mines. (Tr. 26.)

The losses of tonnage suffered by the western Pennsylvania mines incident to the advent of the reduced Ohio intrastate rates. (Tr. 26.)

The losses of tonnage suffered by the West Virginia mines incident to the advent of the reduced Ohio intrastate rates. (Tr. 26-27.)

The competition of the mines in western Pennsylvania, West Virginia, Virginia and eastern Kentucky with the mines of Ohio in these northeastern Ohio markets. (Tr. 27.)

Comparisons of the Ohio intrastate rates with other rates on bituminous coal applicable in northwestern Pennsylvania and western New York territory as well as eastbound, with the finding by the Commission that,—

"the former rates in Ohio were not higher than rates in the same general territory and that the reduced rates are on a lower basis than prevail on interstate shipments of bituminous coal from the Appalachian district." (Tr. 28-29.)

The evidence offered by the Wheeling & Lake Erie in support of its contention that the reduced Ohio rates are maximum rates. (Tr. 29-30.)

An analysis of the study of transportation costs submitted by the Wheeling & Lake Erie with the conclusion that because of various imperfections in the study, "it is certain that the estimated transportation costs do not represent an accurate and reliable measure of the probable actual costs. On this account the results of the study cannot be used as *the sole* guide as to what the maximum reasonable rates should be for the transportation services here involved." (Tr. 29-33—, italics ours.)

An analysis of the "extensive evidence" submitted by the Ohio operators "in the form of locomotive-performance charts intended to indicate the operating conditions surrounding the movement of coal, both in intrastate and interstate commerce," permitting the conclusion by the Commission that,—

"We are not convinced that computations based on the rated tractive power of locomotives, even if correctly computed, are an accurate or reliable measure of operating conditions on different lines." (Tr. 33-34.)

Comparative transportation conditions, and the accord of witnesses for the carriers that, "there are no substantial differences between the transportation conditions in eastern and northeastern Ohio and those prevailing from the Pittsburgh group or any of the other groups west of the mountains in the Inner and Outer Crescent groups, to northeastern Ohio." (Tr. 35.)

Recognition that the Commission-made so-called Indiana-Illinois scale of rates on bituminous coal was frequently referred to in this proceeding as the basis for the Ohio intrastate reduced rates and a recital of the reasons to support the finding that the Indiana-Illinois scale is not acceptable as the measure of what the rates should be in this northeastern Ohio territory. (Tr. 35-36.)

The relationship of rates on other commodities in Illinois territory on the one hand and Central territory on the other. (Tr. 36-37).

The reliance of the P. & W. V. Ry. upon the Indiana-Illinois scale in justification of its interstate reductions but with the further finding that "it is the desire of this respondent to maintain the established differential of 10 cents under the Pittsburgh district rates from its mines in the Ohio Number 8 district to Cleveland and many other northeastern Ohio destinations." (Tr. 37.)

A discussion of the so-called ex-river rates and the history of their establishment as deduced from prior reports of the Commission but with the statement respecting such rates that "that issue is not here presented." (Tr. 37-43.)

A recital of the complaint filed by the western Pennsylvania operators, and the attack therein on the level of the rates from western Pennsylvania producing districts to northeastern Ohio as well as upon the rate relationship between those interstate and the intrastate Ohio rates. (Tr. 43-44.)

The reliance of the western Pennsylvania complainants upon the Indiana-Illinois scale and reference to

the disposition elsewhere in the report of the contentions based upon that scale. (Tr. 44-45.)

A recital that the Pittsburgh to Youngstown "key" rate had been found to be not unreasonable in 1914 in *Youngstown Sheet & Tube Co. v. P. & L. E. R. R. Co.*, 29 I. C. C. 428, and that the present Pittsburgh to Youngstown rate resulted from the application since that time of general increases and decreases in the entire rate structure, thus making the present-day level the rate of $1.34 complained against. (Tr. 45-46.)

A recital of the comparisons of the western Pennsylvania to northeastern Ohio interstate rates with the rates in the so-called Holmes & Hallowell scale applicable from Duluth-Superior docks to northwestern destinations, and a disregard of those comparisons on the finding that the Homes & Hallowell scale is not acceptable as an appropriate yardstick by which to measure the rates here in issue. (Tr. 46-48.)

A finding with respect to the intervention of Cleveland consigness that the Commission cannot subscribe to the theories advanced by those interveners in opposition to the manner in which related rates had been generally increased and decreased in the past. (Tr. 48.)

A finding with respect to the contentions of certain Youngstown interveners that the evidence of record does not warrant a separation of the Freeport from the Pittsburgh district. (Tr. 48-50.)

A recital that the defendant carriers in the western Pennsylvania complaint had submitted for comparative purposes substantially the same rates which they had offered in the Ohio investigation, with adherence to the previous finding that such comparisons show that the interstate rates from western Pennsylvania to northeastern Ohio are reasonable. (Tr. 50.)

A finding that the Continental Coal Company complaint, Docket No. 25656, presented the question of splitting the Fairmont producing district of northern West Virginia, and that that issue "will be reserved for further consideration." (Tr. 51-55.)

A discussion of the complaint of the Consolidation Coal Company, No. 25670, and findings with respect to the extent of its shipments from the Fairmont district into northeastern Ohio, the severe competition which it there meets, the increases in the differentials of

Ohio under Fairmont and against which the Fairmont district must ship to northeastern Ohio, because of the reductions in the Ohio rates, and arithmetical details of the particular losses suffered by this complainant in northeastern Ohio markets on account of the reductions in the Ohio rates. (Tr. 55-57.)

The fact that the rate comparisons relied upon by the Consolidation were the same as those already discussed and disposed of. (Tr. 57.)

A recital of the Section 3 complaint of the operators located in southern West Virginia, southwestern Virginia, eastern Kentucky, and to some extent, in Tennessee, and the extent to which the Ohio intrastate rate reductions had increased the differential handicap of shippers from those districts and the losses of business suffered by those districts in northeastern Ohio markets. (Tr. 57-59.)

Following these many subsidiary discussions and findings with respect to the large volume of evidence before it, the Commission set out at length a summary of its findings, showing, among other things, that the rate adjustment in this general territory is the result of carrier and commercial competition over a long period of years, affected also by consumer demands for particular kinds of coal, and in some instances by decisions of the Commission; that the business of mining and producing bituminous coal in these various districts has been developed upon this rate adjustment; that coal has moved freely on such rates, and moved freely between Ohio points prior to the reductions in the Ohio intrastate rates; that because of the complaints against the interstate rates on the ground of unreasonableness and undue prejudice, the lawfulness of the rates should be determined with great regard for the value of the service to the shippers, in which connection the Commission found that "distance has never been made the sole measure of these rates"; that the interstate rates assailed as unreasonable did not prevent a substantial movement to Ohio in competition with the Ohio mines prior to the Ohio intrastate reductions; that under such circumstances

"only the most convincing evidence would warrant the disruption of the long-existing relationship of rates or the reduction of interstate rates"; and, further, that, "that convincing proof does not appear on the present record." (Tr. 61-63.)

The Commission then further found that,—

> "The record fully establishes that the Ohio reductions constitute a real discrimination against and obstruction to interstate commerce, and this is especially true under the present economic condition as lower grade coal for domestic and steam purposes than previously was obtained from interstate districts is being obtained from the Ohio districts since the reductions in rates in Ohio." (Tr. 63.)

VI. THE ORDER OF THE COMMISSION, BEING BASED UPON SUBSTANTIAL EVIDENCE BEFORE THE COMMISSION, AND SUPPORTED BY ADEQUATE FINDINGS BY THE COMMISSION, IS LAWFUL.

The long established rule of this Court in reviewing the affirmative orders of the Interstate Commerce Commission was stated in *Interstate Com. Com. v. Union P. R. Co.*, 222 U. S. 541, 547, as follows:

> "There has been no attempt to make an exhaustive statement of the principle involved, but in cases thus far decided, it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein

involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power."

In the development of the law since that time, this Court has refused to make of itself "the fact-finding body," and has squarely placed upon the Commission the duty to make "appropriate findings upon evidence" to support its formal findings in the language of the statute, and its orders. See the *First Florida Log case, Florida v. United States*, 282 U. S. 194, 212, 215; also *Beaumont, S. L. & W. R. Co. v. United States*, 282 U. S. 74, 86, and *Baltimore & O. R. Co. v. United States*, 277 U. S. 291, 301-302.

The rule so laid down is equally applicable to instances of unlawful prejudices and discriminations as between interstate rates and to those arising as between intrastate and interstate rates. The rule in this respect was very recently summarized in the *Second Florida Log case, Florida, et al. v. United States, et al.*, ... U. S. ...., decided April 2, 1923, in the following language (italics ours):

> "The question of the weight of the evidence was for the Commission and not for the court. *The authority conferred upon the Commission by Section 13 (4) of the Interstate Commerce Act, with respect to intrastate rates, is not different in its quality or effect from that given to the Commission to prevent other sorts of unjust discrimination against interstate commerce.* That authority rests upon the constitutional power of the Congress, extending to interstate carriers as instruments of interstate commerce, to require that these agencies shall not be used in such manner as to cripple, retard, or destroy that commerce, and to provide for the execution of that power through a subordinate body. *The Shreveport Case*, 234 U. S. 342, 351, 354, 355; *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co., supra.* The purpose for which the Commission was created was to bring into existence a body which, from its special character, would be best fitted to determine, among other things, whether upon the facts in a given case there is an un-

just discrimination against interstate commerce. *United States v. Louisville & Nashville R. R. Co.*, 235 U. S. 314, 320. That purpose unquestionably extended to the prohibited discrimination produced by intrastate rates. *In relation to such a discrimination*, as in other matters, when the Commission exercises its authority upon due hearing, as prescribed, and without error in the application of rules of law, its findings of fact supported by substantial evidence are not subject to review. It is not the province of the courts to substitute their judgment for that of the Commission. *Interstate Commerce Commission v. Louisville & Nashville R. R. Co.*, 277 U. S. 88, 100; *Western Chemical Company v. United States*, 271 U. S. 268, 271; *Virginian Railway Company v. United States*, 272 U. S. 658, 663; *Assigned Car Cases*, 274 U. S. 564, 580; *Merchants Warehouse Company v. United States*, 283 U. S. 501, 508; *Crowell v. Benson*, 285 U. S. 22, 50, 51."

Under Proposition IV of Section A of this brief, we have summarized the evidence which was before the Commission and on the basis of which it made its finding that the reduced Ohio intrastate rates were unduly prejudicial to persons and localities in interstate commerce. That evidence, we respectfully submit, was very substantial in character. The hearings before the Commission were conducted for several weeks; the transcript thereof embraces more than 3000 typewritten pages of testimony; and there were, in addition, several hundred documentary exhibits.

Individual presentations of the evidence in support of their contentions were made by the Ohio interests supporting the Ohio intrastate reduced rates, by the several interstate shipping interests which had filed their individual complaints against the interstate rates and against the undue prejudice to persons and localities in interstate commerce; by the carriers who defended on the ground that the interstate rates were reasonable and otherwise lawful; and by numerous intervening and consuming interests. Particularly substantial, definite and concrete was the evidence offered by the various interstate shippers to prove the immediate and extensive diversion of business from

their interstate mines to the Ohio intrastate mines in the destinations to which the reduced Ohio rates applied. Not only was evidence of this character shown but it was also shown that in those portions of northeastern Ohio to which the Ohio intrastate rates had not been reduced, there was no such diversion from interstate to state business.

We respectfully submit that the evidence before the Commission and upon the basis of which it made its findings, more than meets the requirements of the substantial evidence rule laid down by this court with respect both to interstate and intrastate rates and to undue prejudice to persons and localities in interstate commerce which may be caused by the latter.

On the basis of this substantial evidence the Commission made not merely the formal findings of reasonableness in the interstate rates and of undue prejudice to interstate persons and localities by virtue of the reduced Ohio intrastate rates, but it also made specific findings of fact which produced such ultimate results, and then made numerous subordinate findings of fact which further support its ultimate conclusion.

Proposition V. of Section A of this brief discusses these formal findings and these individual findings of fact made by the Commission at great length. The court will observe that the finding of undue prejudice against persons and localities in interstate commerce rests upon a large number of underlying findings of fact with respect to rates and rate history; to rate relationships in the territory involved; to the carrier and market competition involved; to the kind and quality of the coals produced in the competing districts, and the extent to which the interstate coals compete with the coals produced in the Ohio districts; to the volume of the coal movement; to the losses of tonnage suffered by the interstate shippers because of the reduced Ohio intrastate rates; to the relation of the rates in issue to other rates on the same commodity in adjacent and other territory; to the circumstances and conditions of transporta-

tion, and to transportation costs measured both by money and by locomotive tractive effort expenditure; and to the Commission's own Indiana-Illinois scale of rates on bituminous coal and why the same is not a fair criterion of what rates should be in Ohio. Finally, there is the definite conclusion that the reduced Ohio intrastate rates,—

> "constitute a real discrimination against and obstruction to interstate commerce", (Tr. 63)

especially because under the present economic conditions the lower grade Ohio coal is supplanting interstate coal because of the reduced rates on the former.

It would be difficult, we respectfully submit, to find a case in which there were more definite findings on evidence underlying the formal conclusions of the Commission that the intrastate Ohio rates unduly prejudiced persons and localities in interstate commerce. The question here is as to the substantial character of the evidence before the Commission and the adequacy of its findings; the question is not whether on that evidence and on such findings a body other than the Commission might have reached a different administrative conclusion.

We therefore respectfully submit that the Commission made adequate findings of fact based upon substantial evidence, to support its formal conclusions that the Ohio intrastate rates unduly prejudiced persons and localities in interstate commerce.

VII. THE DECREE OF THE DISTRICT COURT SHOULD BE AFFIRMED, AND THE APPEALS SHOULD BE DISMISSED.

The first of the so-called Section 13 cases,—the *Wisconsin case, Railroad Commission v. C. B. & Q. R. Co.*, 257 U. S. 563, 578-579, recognized that two questions might arise with respect to intrastate rates under that section. First, do the intrastate rates work an undue prejudice

against persons and localities in interstate commerce such as to justify a horizontal increase of them all, and, second, do the intrastate rates unduly discriminate against interstate commerce as a whole in such manner that it is the duty of the Commission to remove such undue discrimination.

Under either of these prohibitions the court recognized in the *Wisconsin case* that a state-wide order might issue to remove the unlawfulness in the offending intrastate rates. It was there said that "any rule which would require specific proof of discrimination as to each fare or rate and its effect, would completely block the remedial purpose of the statute." (page 579).

The Commission's order of investigation into these reduced Ohio intrastate rates on bituminous coal covered both of the prohibitions of Section 13,—that is, the investigation went to the question of undue prejudice to persons and localities in interstate commerce, and also to the question of unjust discrimination against interstate commerce as a whole, in the revenue sense. The order of the Commission which is here under attack required that the Ohio rates be restored to the previously effective higher level in order to remove the specific undue prejudice to persons and localities in interstate commerce because of such rates, and in order also to remove the unjust discrimination against interstate commerce as a whole in a revenue sense, also the result such reduced Ohio rates.

The District Court, however, sustained the order of the Commission on the first ground only,—that is, as an order justified to remove an undue prejudice to persons and localities in interstate commerce. It said (Tr. 468-469):

> "It may possibly be that the findings before, and the subordinate fact-findings of, the Commission are insufficient to sustain the ultimate conclusion of discrimination against interstate commerce as a whole. Florida v. United States, 282 U. S. 194. * * * in view of the holding of the Florida case, that where the

> Commission undertakes to sustain an order as to intrastate rates on the ground that they impose an undue burden upon the revenues of the carrier, 'it must appear that there are findings, supported by evidence, of the essential facts as to the particular traffic and revenue, and the effect of the intrastate rates, both as existing and as prescribed, upon the income of the carrier, which would justify that conclusion,' it is possible that the findings in the present case are not full enough or specific enough."

Having thus declined to support the order as one necessary to remove general unjust discrimination against interstate commerce in a revenue sense, the court proceeded to support the order in its removal of undue prejudice to persons and localities in interstate commerce. It said (Tr. 469-470):

> "We do not believe that it is necessary to decide any other question, for the right of the Interstate Commerce Commission to remove such preference and prejudice, if it exists, is no longer open to dispute. *Louisiana Public Service Commission v. Texas & N. O. R. Co.*, 284 U. S. 125, 131; *Florida v. United States*, *supra*, p. 210. Nor do we think that it can be disputed, upon the present record, that there is substantial evidence to support the finding of discrimination against persons and localities, if not, in fact, a demonstration of the correctness of that finding."

Observe that on this point the court was convinced not only that the Commission had substantial evidence on the subject of undue prejudice to persons and localities, but apparently was also convinced that that evidence of itself constituted "a demonstration of the correctness" of the Commission's finding. What is set forth in Propositions IV. and V. of Section A of this brief demonstrates the accuracy of the view of the District Court in these respects.

The order of the Commission thus sustained by the District Court is not a state-wide order, for the fact is that the undue prejudice and preference complained against

and found to exist was not caused by any state-wide reductions in rates. Those reductions in rates did not, indeed, apply even throughout all of northeastern Ohio. They applied only to such territory as could be reached by the service of the Wheeling & Lake Erie Railway, in the first instance, and as thereafter met by the trunk lines by their service.

The evidence before the Commission clearly demonstrated the existence of the undue prejudice against the interstate commerce to the important destinations in Ohio to which the Ohio rates were reduced. All that the order of the Commission accomplished was the restoration of all the formerly effective rates to remove that undue prejudice. The order in that scope is fully sustainable under the rule of the *Wisconsin case*, as quoted above.

We respectfully submit that the action of the District Court was in all respects proper and should be affirmed, and that these appeals should be dismissed.

Section B.

Reply Argument.

The Ohio brief criticises these appellees for taking an "about-face!" attitude in Court as compared with their attitude before the Commission. (See Ohio brief, pp. 26, 53) We therefore desire that the court should have a correct understanding of just what our position is and has been throughout these proceedings.

In the case of Cleveland, the largest coal-consuming destination here affected, the result of the Ohio reductions was to increase the rate handicap of the most important interstate district, Pittsburgh, from 10 to 39 cents per ton, as compared with Ohio No. 8. This increase of almost 300 per cent resulted to the immediate great disadvantage of the Pittsburgh and other western Pennsylvania shippers, whose customers at once commenced to supplant their Pittsburgh and other western Pennsylvania pur-

chases by Ohio coal. The losses were so serious that immediate action was necessary.

It was under these circumstances, as already stated, that the western Pennsylvania operators filed their individual complaint before the Commission attacking the interstate rates to northeastern Ohio destinations and seeking their reduction to the relative levels of the new reduced Ohio rates, and relief from the undue prejudice to persons and localities in interstate commerce occasioned by those reduced Ohio rates.

In their prosecution of this complaint the western Pennsylvania operators were just as active in attempting to prove that the interstate rate levels were unreasonably high, as were the Ohio operators in their endeavor to prove that the Ohio intrastate levels were proper. The western Pennsylvania operators offered a large volume of evidence to show rate history, rate relationships, comparisons with other rates, distances, studies of transportation conditions other than distance, and the effect of the reduced Ohio rates upon the competition in the northeastern Ohio markets. This was but a part of the substantial evidence that was before the Commission for its consideration. Out of this substantial evidence, offered not only on behalf of western Pennsylvania, but by all the other interstate interests and carriers, the Commission concluded first that the interstate rates were not unreasonably high, and, second, that the Ohio rates were unduly prejudicial to persons and localities in interstate commerce, and unjustly discriminatory against interstate commerce in a revenue sense.

On behalf of western Pennsylvania, we frankly say that we share the disappointment of the Ohio interests in the Commission's conclusion that the interstate rates are not unreasonably high. But, differing from the Ohio interests, we find ourselves unable to deny that the Commission reached its conclusion on the issues of reasonableness and undue prejudice on substantial evidence.

Under such circumstances the preference of the western Pennsylvania operators in following the proceedings to the District Court and as appellees here, is to recognize the force of the established rules of this court respecting the review by it of decisions and orders of the Interstate Commerce Commission, rather than to chase a will-o'-the-wisp. In so doing we adhere to our original major premise, which was and which is, that the relationship between the interstate rates from western Pennsylvania and the Ohio intrastate rates as reduced, gave rise to undue prejudice to persons and localities in interstate commerce.

VIII. THERE IS NOTHING IN THE RECORD BEFORE THE COMMISSION TO WARRANT THE CHARGE THAT THE STATE OF OHIO AND THE PROPONENTS OF THE OHIO INTRASTATE RATES WERE DENIED THE FULL HEARING REQUIRED BY SECTION 13(4) OF THE INTERSTATE COMMERCE ACT.

(a). *The Admission of Pre-determination.*—At least thirteen times in the argument of their Proposition I. the appellants in one or another choice of words, charge that the Interstate Commerce Commission denied a fair hearing to the Ohio interests because it entered upon this proceeding of investigation, "resolved in the beginning" that it would restore the Ohio rates to the formerly-effective levels.

This is a serious charge! It necessarily means, if true, that the members of the Interstate Commerce Commission —at least the ten members who concurred in the report and order,—were unmindful of their oath of office in pursuing and disposing of this investigation. If that charge were true, we would have no alternative except to support the Ohio interests in making it, for that would be our duty.

It may be assumed, because of the seriousness of this charge, that the appellants in making it would put their best foot foremost, and direct the attention of the court to

precisely what it is in the record before the Commission which demonstrates that the Commission so acted. But their argument discloses nothing except a quotation from the opening paragraph of the Commission's report (Tr. 19-20), reciting that the Commission entered upon the investigation—

> "with a view to prescribing such nondiscriminatory, nonprejudicial, and otherwise lawful rates and charges for such (Ohio) traffic as the facts and circumstances may warrant."

This is all that is quoted to support the charge made immediately thereafter (Brief, p. 11) that,—

> "the Commission entered upon the investigation into the lawfulness of the Ohio rates *resolved to find them unlawful so that it might prescribe higher rates.*"

We respectfully submit that this quotation from the Commission's report does not by any means justify the argument by appellants thereon. To a mind not warped by the desire to maintain an unlawful rate advantage as long as possible (for it must be remembered that "the Ohio interests did not contend that the new relation between the Ohio rates and the western Pennsylvania rates was correct,"—Brief, p. 26), it would seem to be nothing more than a statement by the Commission that it was entering upon this investigation of the Ohio intrastate rates with a view to nothing more than the performance of its statutory duty. It could do no more and it could do not less. Beyond this quotation there is nothing but deduction, inference, and argument to support appellants' charge of "pre-determination" and "pre-conception" on the part of the Commission with respect to this proceeding. However, there is, as we see it, very definite evidence in the record that the Commission was guided by no such pre-determination or pre-conception, as appellants charge.

We refer to the fact that after the Ohio intrastate reductions, the Pittsburgh & West Virginia Railway made reduc-

tions from Pittsburgh district interstate mines on its line to the same Ohio destinations, for the purpose of maintaining existing relationships. These reductions were suspended by a division of the Commission on September 8, 1932, in I. & S. Docket 3801. (Tr. 1910) Subsequently, however, on petition of these appellees and other parties for reconsideration of that action, the entire Commission, on October 3, 1932, entered its further order permitting the reduced interstate rates from Pittsburgh district mines on the P. & W. V. to go into effect, but continued the investigation thereof. (Tr. 1941) The pertinent point to be noted is that this action permitting the reduced interstate rates to go into effect was taken by the Commission on October 3, 1932, *the same day when the Commission first entered into its proceeding of investigation into the Ohio reduced rates* in Docket 25566, the title case. (Tr. 1855)

Subsequently the Wheeling & Lake Erie, the necessary participant in the reduced interstate dates from Pittsburgh district P. & W. V. mines, withdrew its participation in such rates. That action compelled the P. & W. V. again to file with the Commission the formerly effective higher interstate rates to northeastern Ohio destinations. Thereupon the Commission immediately suspended those proposed increased rates, permitting the reduced interstate rates, made to preserve relationships with the Ohio reductions, to continue in effect from P. & W. V. Pittsburgh district mines. (Tr. 1984).

We submit that this action of the Commission is proof positive that it never proceeded to the investigation of the Ohio intrastate rates upon a "pre-conception" that those rates were unlawful and a "pre-determination" to restore them to the previously effective higher levels. Had anything of that sort been in the Commission's mind it would never have permitted the extension of those reductions to the P. & W. V. interstate mines, and the maintenance of those reductions when the Wheeling & Lake Erie tried to force their cancellation.

(*b*). *The Evidence.*—Appellants next proceed to a discussion of the Commission's attempt to marshal the evidence to support its "pre-conception" and "pre-determination" respecting the Ohio rates.

This section of their brief begins with a disavowal of any intention to ask the court to weigh the evidence and make findings of fact (page 12). It concludes (page 21) with a discussion of the dissenting opinion of Commissioner Eastman and a quotation therefrom (Tr. 69) which on its face is nothing more than evidence that the Commissioner's dissent was entirely on the weight of the evidence,—a very proper position *for a Commissioner*. Thus the appellants are driven, in their attempt to support their argument on the Commission's "pre-determination" and "pre-conception", to an argument on the weight of the evidence, for reliance upon the dissenting opinion of Commissioner Eastman appears throughout this section of appellants' brief, and the entire section constitutes nothing but argument of the facts in the hope that the court will substitute its views for those of the Commission. This the Court will not do. *Interstate Com. Com. v. Union P. R. Co., supra*, page 547.

Propositions IV. and V. of Section A of this brief have discussed the substantial evidence before the Commission and the findings of fact made by the Commission, at length. We shall not repeat that argument here. We do, however, direct particular attention to these points:

There is no "remarkable dearth of evidence" with respect to rates between points in Ohio, Pennsylvania, Maryland, and New York, in the record before the Commission. (See Appellants' brief, page 19.) There is on the contrary, a large amount of such evidence, which shows in very definite form the relationship between the reduced Ohio rates and the rates to other northeastern Ohio destinations and to destinations in northwestern Pennsylvania and western New York, all of which is included in what is some-

times called the triangle territory lying between Pittsburgh, Rochester, N. Y., and Lorain, Ohio.

Nor is it true that such rates have never been passed on by any regulatory authority. (See appellants brief, page 19.) The Commission's report shows that the "key rate" in this adjustment is the Pittsburgh-Youngstown rate, and that that rate today, $1.34, is the result of a rate of 70 cents found not unreasonable in *Youngstown Sheet & Tube Co. v. P. & L. E. R. R. Co., supra,* plussed and minused by the general increases and decreases in rates since. (Tr. 23, 24) The rates on bituminous coal from the Reynoldsville, Pittsburgh, Connellsville, Number 8, and Cambridge districts to Buffalo were found not unreasonable in *Lackawanna Steel Co. v. Director General,* 87 I. C. C. 383, and this was adhered to in *Lackawanna Steel Co. v. P. R. R. Co.,* 88 I. C. C. 759, 760. These are rates which are important from the standpoint of tonnage moving thereon.

Nor is it true that all of the Ohio rates here involved are in the category of "rates which have been fixed by the Ohio Commission." (See appellants' Brief, page 19.) As we have already shown, the rates really fixed by the Ohio Commission were the rates from Middle-Massillon and Ohio Number 8 districts to Canton and Massillon; the numerous other reductions were usually hung thereon by voluntary action of the railroads, acquiesced in by the Ohio Commission, without passing specifically upon the rates.

Nor is it true that the record is without evidence of the amount of the tonnage moving upon these various rates (See appellants' Brief, page 19). Tonnage statistics within this entire territory fairly spatter the record before the Commission.

Again, it is not true that as to many of these rates, "there was no showing with regard to transportation conditions." (See appellants' Brief, pages 19-20.) Such showing with respect to this very territory and all to the effect that transportation conditions in western Pennsylvania, western New York, northern West Virginia, and east-

ern Ohio are generally similar and so much so that there is no good reason from the standpoint of transportation conditions for any difference in rates on bituminous coal, was given by carrier witnesses Triem (Tr. 701, *et seq.*), Hewes, (Tr. 713, *et seq.*), and Heinisch, (Tr. 725, *et seq.*). There was further evidence on this subject by the western Pennsylvania operators through witness Boden (Tr. 767, *et seq.*). Also, as previously shown, the locomotive tractive effort studies offered on behalf of the Ohio operators and the Wheeling & Lake Erie, fully bore out the testimony of these carrier witnesses.

It is true, as stated by the Ohio interests (Appellants' brief, page 20) that transportation conditions east of the Alleghenies are generally understood to be somewhat more severe than those west of the Alleghenies. But the point is that the rate comparisons before the Commission embraced numerous rates in the Pittsburgh-Rochester-Lorain triangle, which lies west of the Alleghenies.

We submit that the only real difficulty which the Ohio interests find with "the Commission's attempt to marshal the evidence" is with the conclusion of the Commission on the weight of the evidence. The evidence being substantial, the court will not undertake to upset the Commission's conclusions of fact thereon.

(*c*). *The Presumption.*—Next, in Proposition I of appellants' brief, is their discussion of "The resort to the presumption" by the Commission. In substance, this refers merely to the presumption attributed by the Ohio interests to the Commission that the Ohio rates were too low and should be increased. In other words, this is another argument on the point that the Commission entered into the investigation "resolved to raise the Ohio rates." (See appellants' brief, page 21.) However, the Ohio interests here further argue (appellants' brief, page 22) that all this is more definitely shown by the statement of the Commission (Tr. 63) that "only the most convincing evidence

would warrant the disruption of the long-existing relationship of rates or the reduction of the interstate rates."

The court will observe that under this head the appellants (brief, pp. 24 and 26) argue that the Commission relies upon "certain rate relationships, said to be of great age" as another of the things that led the Commission to its final conclusion. This charge comes with poor grace from the Ohio interests. As we have already shown, the only rates which the Ohio Commission really fixed *per se* in the first instance, were those from the Middle-Massillon and Ohio Number 8 districts to Canton and Massillon. After those rates had been pegged, about everything else in the way of a rate reduction on Ohio intrastate business was the result of "certain rate relationships." The extension of the original reductions to Canton and Massillon to such destinations as Cleveland, Lorain and Akron was to preserve competitive relationships between destinations. The extension of the Ohio Number 8 rates to Cambridge was on the ground that Cambridge usually took the Ohio Number 8 rate, although its haul to these northeastern Ohio destinations is much longer. The extensions of the Number 8 and Cambridge rate thereafter to the districts to the west and south was again to maintain "certain rate relationships."

In other words, that which the Ohio interests now condemn in the action of the Interstate Commerce Commission, with respect to interstate rates, is the very thing which was invoked by the Ohio Public Utilities Commission for the benefit of the Ohio operators with respect to intrastate rates.

Furthermore, the Ohio operators admit that the result of what was done in that state was to give rate benefits to Ohio intrastate coal, and they make no contention that the new relation between the Ohio rates and the western Pennsylvania rates was correct. (Brief, pp. 25-26) That admission may well be made, for it costs them nothing and would cost them nothing so long as the Ohio rates were

maintained at the reduced levels and the interstate rates were not similarly reduced to maintain existing relationships.

We respectfully submit that throughout this whole Proposition I of their brief, the appellants aim merely to convince the court that the finding of the Commission was, upon the weight of the evidence, wrong. This on well established law, already cited, is something that the court will not consider.

IX. THERE WAS SUBSTANTIAL EVIDENCE BEFORE THE COMMISSION TO SUPPORT THE FINDING THAT THE RESTORATION OF THE STATE RATES REQUIRED BY IT WAS NECESSARY TO AVOID UNDUE PREJUDICE TO PERSONS AND LOCALITIES IN INTERSTATE COMMERCE.

At pages 29-30 of their brief, appellants quote three paragraphs from the report of the Commission and say that "they present fairly and fully the grounds for the formal findings" of the Commission. We take issue with this statement. There is much more in the Commission's report than the three paragraphs so quoted, and we refer, for additional findings of the Commission, to what is said in Section A of this brief under Proposition V.

Once again the appellants argue in this connection (page 31) that the Commission found that,—

> "Only the most convincing evidence would warrant the disruption of the long existing relationship of rates." (Tr. 63)

The court will first observe that the Commission did not require "the most convincing evidence" with respect to the rate relationships only; it required the same character of evidence with respect to "the reduction of the interstate rates", (Tr. 63) and found that such evidence did not appear on the present record.

The fact of the matter is that this repeated reference by the appellants to the phrase "the most convincing evidence" is the repetition of a phrase which is found only at the conclusion of the Commission's summary of its report. Obviously, the Commission was merely saying that in the face of all that had gone before, of all that it had discussed throughout the thirty-odd pages of its report and its many underlying findings, only the most convincing evidence would justify reduction of the interstate rates or disruption of the rate relationships. The District Court was apparently of that view. (Tr. 470.) Certainly, under those circumstances, the use of that phrase is not to be wondered at, and at any rate, it is merely an indication that the Commission was weighing the evidence. And weighing the evidence, according to the long-established rules of this court, is the function of the Commission, and a task that will not be assumed by the court.

Next, at page 31 of their brief, appellants indulge in a series of statements that the record does not justify. They say that the facts found by the Commission are silent on the matter of substantial disparity as between rates and service. They apparently overlook the findings with respect to rate comparisons and transportation conditions (Tr. 28-29, 35), and the further finding, (Tr. 63) that the intrastate Ohio movement of coal "is at intrastate rates which are generally substantially lower, distance considered, than are the reasonable interstate rates, herein approved, under which such coal is moved to the same destinations from Pennsylvania and West Virginia." In this there is certainly more than "a word" concerning the measure of the old competitive relationship of rates and services. Thus falls another contention of the appellants at page 31 of their brief.

Next, is another specific statement that "there is no reference to transportation conditions." Nothing more need be said on that subject.

There is complaint also because the Commission made no reference to ton mile earnings. There is no particular obligation on the Commission to state ton mile earnings in its report. But that it had before it and gave consideration to ton mile earnings is demonstrated by the quotation of such from the record at page 52 of the appellants' brief, and those ton mile earnings generally decrease as distance increases.

Then there is the complaint, (page 31) that the Commission makes no reference to distance except to reject it. We had thought that the Commission made a considerable reference to distances in the statement (Tr. 22) that refers to Appendix A of its report for "the average distances over the short tariff routes." Appendix A consists of 3½ pages of distance tabulations (Tr. 70-73). To be sure, the Commission does not say that those particular "average miles short tariff route" are inevitably controlling of the rates, but, as already shown in Section A of this brief, (*ante*, p. 18) there were many other distances submitted to the Commission to show the relationship between the producing districts in reaching the various destinations.

We deny the allegation of the appellants that "the sole criterion invoked is the prescriptive right of interstate shippers to a competitive adjustment asserted to be older than the Commission." (page 31) We answer that what the Commission did was not to invoke prescriptive rights but to fix rates and rate relationships on the usually accepted methods which this court has said are proper for an expert body such as is the Commission. *United States v. Louisville & N. R. Co., supra,* at 320.

The court may observe in this connection with particular reference to appellants' quotation (page 32) from *Louisiana Pub. Serv. Com. v. Texas & N. O. R. Co., supra,* at 135, that in this Ohio case the Commission found that "the Ohio reductions constitute a real discrimination against and obstruction to interstate commerce" and recognized that this was especially true at this particular time when,

under the existing economic conditions, consumers are prone to buy the cheaper coal. (Tr. 63.)

For the reasons set forth above, we also deny the appellants' argument (page 35) that,—

> "The rate relations required to be restored by the Commission are wholly out of harmony with the transportation standard."

In their endeavor to support this argument the appellants complain that the Commission did not attempt to justify its action by the mileage scale prescribed by it for application in the Indiana-Illinois territory. But the Commission is not bound to make rates on a mileage basis; no Commission is so bound, and the Ohio Public Utilities Commission did not consider itself so bound *in this case* in its intrastate action. That is perfectly apparent from the manner in which that Commission, after the original reductions to Canton and Massillon had been made, proceeded to hang other intrastate reductions thereon by the maintenance of rate relationships, both at origins and at destinations.

With respect to this refusal of the Interstate Commerce Commission to consider itself bound in northeastern Ohio by the Indiana-Illinois scale, appellants in their brief at page 36 set forth certain rate comparisons. These comparisons would constitute a fairer showing of the situation if they had been elaborated to include differential districts in Ohio as well as the differential districts in Pennsylvania and in northern West Virginia. We therefore set forth below a comparison from the Ohio Number 8 district and the differential districts in Ohio, and from the base district, Pittsburgh, and the other interstate districts in western Pennsylvania and northern West Virginia, the miles to Cleveland, the rates as they would be on the Indiana-Illinois scale, the Ohio intrastate rates which the Interstate Commerce Commission condemned, and the rates as finally set by the Interstate Commerce Commission:

	Miles	Ind.-Ill. Scale	RATES Ohio Intrastate	I. C. C.
Ohio No. 8	128.2	$1.40	$1.45	$1.74
Cambridge	176.1	1.65	1.45	1.74
Crooksville	170.9	1.65	1.47	1.76
Hocking	199.3	1.75	1.60	1.89
Pomeroy	252.5	2.02	1.60	1.89
Freeport	162.9	1.65	None	1.84
Pittsburgh	162.0	1.65	"	1.84
Connellesville	216.4	1.85	"	1.90
Fairmont	247.0	1.94	"	1.99

It must be kept in mind that the foregoing Indiana-Illinois scale rates are made on the distances shown, which are averages from active mines only, as included in Appendix A to the Commission's report. There were numerous other distances in the record before the Commission, (*ante*, p. 18) and on these the advantage of Ohio Number 8 in reaching Cleveland is considerably less than is apparent in the foregoing tabulation.

But even the foregoing tabulation does not show the entire situation as it exists in this northeastern Ohio, northwestern Pennsylvania and western New York territory. For that reason we set forth below another tabulation which compares the position of Pittsburgh and the Ohio Number 8 districts in Youngstown, Erie, Buffalo, and Rochester (Ex. Tr. II., 260, 279):

	From Pittsburgh			From Ohio No. 8		
To	Miles	Rate	I-I Scale Rate	Miles	Rate	I-I Scale Rate
Youngstown	99	$1.34	$1.22	124	$1.34	$1.40
Erie	193	1.84	1.75	227	1.84	1.94
Buffalo	287	2.24	2.10	330	2.24	2.26
Rochester	366*	2.37	2.34	409*	2.37	2.50

*These distances exceed scale maximum: rates made by progression of rate in last prescribed bracket in scale,—8 cents for 25 miles.

The court will observe that none of these rates have been made, as the Commission well says, on a distance basis. They have been made on a differential basis. It will be seen from the second table that when the Ohio coal moves to Youngstown and to the interstate territory farther east,

it does so at a marked advantage in rates, distance considered, as compared with the competing coal in Pittsburgh. This is merely the result of rate-making on a differential system, a system which was utilized by the Ohio Commission with respect to the intrastate rates and which is utilized by the Interstate Commerce Commission with respect to both the interstate and the intrastate rates.

We come now to the final argument of appellants (brief, page 39) that "even if it could be said that the doctrine of prescription invoked by the Commission justified its order as to certain of the Ohio rates, it would be impossible to sustain it as to the particular rates just discussed. They never bore any traditional relationship to interstate rates and the doctrine of prescription could not apply to them." The answer to this is that even though the doctrine of prescription did not apply, the law of undue prejudice and preference did apply, and justifies the Commission's action.

Finally on this proposition, at page 40, appellants' brief charges that the court, along with the Commission, disposed of this controversy on the assumption that "its duty was to protect the vested interests of interstate shippers and carriers in the *status quo*." They then invite their opponents to set out the evidence which they believe the court thought required the conclusion at which the Commission arrived. We accept the invitation and we refer this court to what is set forth in Proposition IV. in Section A of this brief.

X. THE FAILURE OF THE COMMISSION TO FIX THE LEVEL OF ALL THE INTERSTATE RATES FROM ALL BITUMINOUS COAL PRODUCING DISTRICTS TO ALL NORTHEASTERN OHIO DESTINATIONS DOES NOT INVALIDATE THE COMMISSION'S ORDER.

The contention of the appellants in their Proposition III. is that the Commission exceeded its authority in requiring that the Ohio intrastate rates be raised without having first found or made reasonable *all* substantially competitive interstate rates to the same destinations. This allegation has particular reference to the failure of the Commission in this investigation to fix the level *per se* of the rates from the so-called southern districts,—in southern West Virginia, southwestern Virginia, eastern Kentucky, and northeastern Tennessee,—and the ex-Ohio River rates to northeastern Ohio destinations. The authority relied upon is the *First Florida log case, supra.*

The appellants describe the adjustment of the rates from Ohio and the southern districts at length (pages 40-42). The fact is that this so-called Ohio-Crescent adjustment of rates was originally fixed by the Commission in *Bituminous Coal to C. F. A. Territory,* 46 I. C. C. 66, and adhered to in *Ohio-Michigan Coal Cases,* 80 I. C. C. 663. But the Court will observe from the report in the *C. F. A. case* at page 71, that the rates there considered by the Commission were rates to destination territory *west of the Sandusky-Galion line,* whereas the territory involved in this Ohio investigation is *east* of the Sandusky-Galion line. The court will also observe from the report in the *Ohio-Michigan cases,* page 66, that it is there again shown that the destination territory to which this particular adjustment of rates applies is the territory *west* of the Sandusky-Galion line.

It follows, therefore, that the rates from the southern districts which the appellants insist the Commission must have fixed before raising these intrastate rates to north-

eastern Ohio, are not at all controlling with respect to northeastern Ohio destinations; furthermore, this is so even though to a minor extent, the relationship of producing districts in southern Ohio and in the south in the rates to the territory west of the Sandusky-Galion line has been projected to some destinations east of that line in Ohio.

The fact is that the great bulk of the coal consumed in northeastern Ohio is from eastern Ohio districts and from the western Pennsylvania and northern West Virginia districts. The controlling rates are those from Pittsburgh; the rates from the other districts that move this bulk of the coal to northeastern Ohio are made differentially in relation to Pittsburgh. When, therefore, the Commission in this proceeding determined the proper level of the rates from Pittsburgh, it had done all that was necessary as a preliminary to its action under Section 13 on the Ohio rates, and this is particularly so because the complaint and answer cases embraced in the consolidated proceedings brought in issue the level of those particular interstate rates.

There is nothing in the decision of this court in the *First Florida case,* and we find nothing in any other decision of this court, as authority for appellants' proposition that the Commission cannot act with respect to the intrastate rates until it has first fixed or approved *all* of the interstate rates which move coal to this destination territory. Certainly there is nothing in the decisions which overcomes the provision of Section 13 (4) of the Act, that whenever the Commission finds undue prejudice to interstate commerce in *any* intrastate rate, it may proceed to remove the same by prescribing the particular intrastate rate which will remove the unlawfulness. It would be a novelty indeed if Pittsburgh, to secure relief in this matter, must first prove the rates from the South to be reasonable.

However, there is a feature of the *Ohio-Michigan cases* which is exceedingly pertinent in this connection. The Commission there considered (pages 687-691) the lawful-

ness of certain intrastate rates from Ohio producing districts to Ohio destinations, also the result of Ohio Commission action, and condemned such rates to destinations in both northwestern and northeastern Ohio as unduly preferential of Ohio intrastate commerce and unduly prejudicial to persons and localities in interstate commerce,—being those persons and localities shipping from both the northern and southern Crescent districts.

The situation with respect to the ex-Ohio River rates is a matter separate and apart. These are not the ordinary run of rates; they are rates referred to by the Commission as "in the nature of proportionals", being rates that compensate the rail carriers for their proportion of a through river-and-rail service from mine to destination. These rates came into being by the action of the Commission in *Bituminous Coal to Youngstown*, 163 I. C. C. 3, where, at page 13, the Commission prescribed reasonable *maximum* rates from Conway and Colona, Pa., to Youngstown, Ohio. Later other ex-river rates were voluntarily published by the Wheeling & Lake Erie from other ex-river points to other northeastern Ohio destinations, and these were condemned by the Commission, but higher rates permitted to be established. *Ex-Ohio River Coal to Ohio Points*, 185 I. C. C. 211.

Subsequently the Commission reopened both of those proceedings and in its more recent pronouncement, *Coal, Bituminous, Ex-River, from Colona and Conway, Pa.*, 197 I. C. C. 617, has found that the reasonable maximum rates previously prescribed by it are unreasonably low and has ordered them raised to a minimum level prescribed by it. The lawfulness of this order is in issue in the District Court for northern Ohio, Eastern Division, and is under temporary injunction. Obviously, while the temporary injunction is in effect, the original report and order of the Commission, and the reasonable *maximum* rates therein prescribed and now in effect, continue.

These ex-river rates were not in issue in this proceeding and the Commission so stated in its report (Tr. 42-43). Such remarks as it made with respect to the ex-river rates in its report were, therefore, merely *obiter dicta*. There was no party to the proceedings involving the Ohio rates before the Commission who more strenously objected to the admission of any evidence therein with respect to the ex-river rates than the Ohio interests. Ohio, therefore, should not now be heard to complain because the Commission in a proceeding where the ex-river rates were not in issue, and where the Ohio interests objected to their consideration and to the admission of any evidence pertaining thereto, made no findings as to the level of such rates.

Conclusion.

The gist of the Ohio contentions before this court is that the Commission refused to accept as the proper criterion for the level of the Ohio intrastate rates, the levels of the so-called Indiana-Illinois scale, and accepted instead the levels of the interstate rates applicable elsewhere in northeastern Ohio, and in northwestern Pennsylvania and western New York. The Commission had before it substantial evidence on which it was entitled to rely as it did upon the levels of those rates to other northeastern Ohio destinations and to nearby competitive destination territory; and it made proper findings based upon such evidence to support its ultimate conclusion of reasonableness in the interstate rates and undue prejudice to persons and localities in the Ohio intrastate rates. Under such circumstances, and on the doctrine of well established law laid down by this court, the order of the Commission requiring that the Ohio rates be raised to the formerly effective levels is lawful,

and the decree of the court below should be sustained upon that ground.

Respectfully submitted,

WESTERN PENNSYLVANIA COAL TRAFFIC BUREAU, ET AL.

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April 30, 1934.

APPENDIX.

STATUTES RELIED UPON.

The Interstate Commerce Act, (41 Stat. L., 474):

Section 3:

"(1) That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Section 13:

(3) Whenever in any investigation under the provisions of this Act, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this Act with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regu-

lating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this Act.

(4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."